DEVELOPMENT & COMMERCIAL BANK BHD.

v.

CHE WAN DEVELOPMENT SDN. BHD. & ORS, LOH AH KIEW (INTERVENER)

HIGH COURT MALAYA, IPOH
ABDUL MALEK AHMAD J
[ORIGINATING SUMMONS NO. 31-182-88]
28 AUGUST 1989

LAND LAW: *Foreclosure proceedings - Application for order for sale - Allegation of wrong computation of interest - Conclusive evidence clause - Question of compound interest - Section 11 of Civil Law Act - Question of underpayment of stamp duty - admissibility of charge document.*

In this originating summons the plaintiff prayed for an order for sale of certain lands charged by the defendants to the plaintiff to secure a loan given to the 1st defendant under three separate charges.

The intervener had asked to intervene in the proceedings on the ground that she had on 29 September 1987 bought the piece of land charged to the plaintiff by the 3rd and 4th defendants on 23 April 1983 where she had since built a house thus enhancing the value of the property for the benefit of the plaintiff.

The Counsel for the 1st, 2nd and 4th defendants made the following arguments:

(a) the interest due must be categorised into 3 stages, firstly from the date of draw down to the date the cause of action arose, then to judgment, then to realisation;

(b) the proviso to s. 11 of the Civil Law Act disallows compound interest;

(c) the stamp duty on the charge documents were underpaid - the charge documents should therefore be impounded until the stamp duty is fully paid up.

The defendants and the intervener also applied for stay pending appeal.

Held:

[1] Proviso (b) of s. 11 of the Civil Law Act clearly provides that the provisions of s. 11 does not apply if interest is payable by virtue of an agreement - as the charge annexure provides for the payment of interest as claimed the argument of the defendants must fail.

[2] The affidavits of the plaintiffs as to the actual amounts due is accurate. Further the conclusive evidence clause further strengthens this. This argument also fails.

[3] Following *Lall Singh v. Parmanand* the charge documents "having passed by the registering authority as fit for registration, it cannot at this stage be impeached on the ground that it was not sufficiently stamped at the time of registration. Section 294 of the National Land Code 1965 supports this. Further by s. 14 of the Stamp Ordinance it is provided that "when interest is expressly made payable by the terms of an instrument, such instrument shall not be chargeable with duty higher than that which it would have been chargeable if no mention of interest had been made therein. This argument of the defendants also fails.

[4] As the intervener purchased the property after the charge prevails.

[5] On the issue of stay, if the defendants' and the interveners' appeals succeed, that decision would be rendered a nugatory if a stay is not ordered. Although this may not be a "special circumstance" the plaintiff would not be prejudiced by the delayed execution. Further the plaintiff themselves have asked for time to apply for amendment of the order of sale and 2 of the lands have since been redeemed.

[Order Accordingly.]

Cases referred to:

Dobbs v. The National Bank of Australasia Ltd. [1935] 53 CLR 643
Bache & Co. [London] Ltd. v. Banque Vernes Et Commerciale De Paris S.A. [1973] 2 Lloyd's Rep 437
Citibank N.A. v. Ooi Boon Leong & Ors. [1981] 1 MLJ 282
Bank of America National Trust & Savings Association v. Cheong Hoon Chong [1981] 2 MLJ 303
Lall Singh v. Parmanand [1941] MLJ Rep 144
Cheah Theam Swee & Anor. v. Overseas Union Bank Limited & 11 Ors. [1989] 1 CLJ (Rep) 386
Bank Bumiputra Malaysia Bhd. v. Mahmud bin Hj. Mohamed Din & Anor. [1989] 1 CLJ (Rep) 326

Legislation referred to:

Civil Law Act 1956 s. 11
National Land Code 1965, ss. 294, 340
Stamp Ordinance 1949, s. 14

For the plaintiffs - Ong Lan; M/s. Joseph Tan & Tang
For the defendants - Hira Singh; M/s. Asbir, Hira Singh & Co.

JUDGMENT

Abdul Malek Ahmad J:

The plaintiff had filed this originating summons against all four defendants on 26 February 1988. In their supporting affidavit, the branch manager of the plaintiff had averred that the first defendant is the registered proprietor of 78 pieces of land, the second defendant the registered proprietor of 24 pieces of land and the third and fourth defendants the registered co-proprietors of one piece of land. Details of all 103 pieces of land had been accordingly furnished in the schedules to the affidavit.

The plaintiff's branch manager had further stated that as consideration and security for total banking facilities of RM3.5 million granted to the first defendant by the plaintiff, the defendants had executed three separate charges over the respective pieces of land respectively registered on 26 May 1983, 25 February 1988 and 23 April 1988. Subsequently, the defendants had committed a breach of the terms of the respective charges governing them and the plaintiffs' solicitors had sent the letters of demand by registered post to the four defendants dated 16 December 1987, 24 December 1987, 16 December 1987 and 16 December 1987 respectively. Form 16D notices dated 22 January 1988 were subsequently issued against all four defendants be registered post.

When the matter was called on 26 June 1989, the third defendant and his Counsel were absent and as the supplementary affidavit as regards the required particulars of the accounts between the chargors and the chargee had been accordingly filed, I granted the order in terms of the application against the third defendant and fixed the auction date on 28 October 1989.

The application against the other three defendants was adjourned to 29 June 1989 to enable learned Counsel for the plaintiff to check on points raised by Counsel for the defendants and for the Court to also consider the application of Loh Ah Kiew [hereinafter "LAK"] to

intervene in the matter. LAK had filed an affidavit stating that she had bought the piece of land charged by the third and fourth defendants to the plaintiffs on 29 September 1987 and had built a house on it which had enhanced the value of the property to the benefit of the plaintiffs. In view of the order made against the third defendant, she had asked for leave to intervene to protect her interests.

Learned Counsel for the first, second and fourth defendants had argued that the charges were unenforceable as the principal sums and interest rates had not been itemised. As for the rate of interest, he submitted that it should be categorised into three stages, firstly from the drawn down date to the cause of action date, then to the judgment date, and finally to the date of realisation. He referred to s. 11 of the Civil Law Act 1956 and said that the section only applied to the second category and that the proviso disallows compound interest. To my mind, this argument was devoid of merit as proviso (b) to that section had clearly stated that the section does not apply to debts where the interest is payable as of right whether by virtue of an agreement or otherwise. Here, interest had been agreed to by the parties by virtue of the chargee annexures and s. 11 of the Civil Law Act 1956 certainly is not applicable.

The affidavit of the plaintiffs as to the actual amounts owing further strengthens my findings as to its accuracy in view of the similar last paragraph of clause 1 of the three charge annexures which states "and the chargor agrees that statement of the manager/assistant manager/accountant or any other officer of the chargee as to the amount of such balance shall be final and conclusive." In *Dobbs v. The National Bank of Australasia Ltd.* [1935] 53 CLR 643 it was held that:

> a clause in a guarantee given to a bank provided that a certificate signed by the manager of the office at which the principal debtor's account was kept should be conclusive evidence of his indebtedness at a particular date. It was held that the clause was not contrary to public policy as ousting the jurisdiction of the Court and was therefore not void and that a certificate given pursuant to that clause was conclusive upon the parties of the amount and existence of the principal debtor's indebtedness.

Lord Denning's view on this as propounded in *Bache & Co. [London] Ltd. v. Banque Vernes Et Commerciale De Paris S.A.* [1973] 2 Lloyd's Rep 437 was that:

> This commercial practice of inserting conclusive evidence clauses is only acceptable because the bankers or broker who insert them are known to be honest and reliable men of business who are most unlikely to make a mistake. Their standing is so high that their word is to be trusted so much so that a notice of default given by a bank or a broker must be honoured.

Raja Azlan Shah CJ, as he then was, in *Citibank N.A. v. Ooi Bon Leong & Ors.* [1981] 1 MLJ 282 had accordingly followed the principle enunciated in these two cases by saying that:

> In the present case the guarantee contains a clause which enables the bank by producing a certificate of indebtedness by its officer to dispense with legal proof of the actual indebtedness of the respondents. Clause 19 provides thus "A certificate by an officer of the bank as to the money and liabilities for the time being due or incurred to the bank from or by the customer shall be conclusive evidence in any legal proceedings against us or any one of us or our personal representatives." It means that, for the purpose of fixing liability of the respondents, the company's indebtedness may be ascertained conclusively by a certificate.
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> In the circumstances the respondents are bound under clause 19 to accept the certificate of indebtedness duly executed by the assistant vice-president of the Branch as conclusive evidence of the debt due to the bank. On this footing the bank would be entitled to judgment as prayed for.

Consequently, the arguments of learned Counsel for the first, second and fourth defendants must be rejected on this point.

His second point was that the plaintiff should have stamped the charges in respect of the monies advanced more than the amounts previously stamped. As stamp duty was underpaid, he argued that the charge documents should be impounded until the stamp duty is fully paid up. On this issue, its logical explanation had in fact been enunciated as long as about 50 years ago in *Lall Singh v. Parmanand* [1941] MLJ Rep 144 where it was held, also on the allegation of insufficient stamp duty, that "having been passed by the registering authority as fit for registration, it cannot at this late stage be impeached on the ground that it was not sufficiently stamped at the time of registration." Section 294 of the National Land Code also supports the fact that the originals had been properly and sufficiently stamped. In any case, s. 14 of the Stamp Ordinance 1949 has provided that "when interest is expressly made payable by the terms of an instrument, such instrument shall not be chargeable with duty higher than that with which it would have been chargeable if no mention of interest had been made therein." I would, therefore, consequently hold that this argument cannot hold water.

Having held that both the issues raised by Counsel for the first, second and fourth defendants are not sustainable, I accordingly granted order in terms for the plaintiff's application and fixed the auction date, as in the case of third defendant, on 28 October 1989.

On the second date of hearing, learned Counsel for the plaintiff had objected to the affidavit of the intervener being considered as learned Counsel for the first, second and fourth defendants, who was also Counsel for the intervener, had completed his submissions on the previous hearing date. The case quoted by her, namely *Cheah Theam Swee & Anor. v. Overseas Union Bank Limited & 11 Ors.* [1989] 1 CLJ (Rep) 386 is, to my mind distinguishable as here there are two applications and I had yet to hear submissions on the intervener's application. Counsel for the first, second and fourth defendants had submitted only as regards the defendants' application at the earlier hearing and this was the only affidavit deposed by the intervener. In the circumstances, I had overruled her submissions on this point.

As for the intervener's application, as stated earlier, I had allowed her affidavit to be put in and held that it is not disputed that she had bought the property belonging to the third and fourth defendants, the latter being her husband, on 29 September 1987. The relevant charge of the property by the third and fourth defendants to the plaintiff was registered on 23 April 1983.

It is interesting to note that in another suit heard in this Court namely *Bank Bumiputra Malaysia Bhd. v. Mahmud bin Hj. Mohamed Din & Anor.* [1989] 1 CLJ (Rep) 326, the same Counsel for this intervener had represented another intervener in similar circumstances. However, in that case, the intervener had bought the property three years before the charge. The Court had held, on that intervener's claim of priority over the charge, that the registered chargee, despite being later in time, had a registered interest and an indefeasible title against the world under s. 340 of the National Land Code unless there had been allegations of fraud or misrepresentation and the like to which the chargee was party or privy. In our case, the chargee's case is so much stronger as the charge had been registered four years before the sale and purchase. I had therefore dismissed the application with costs.

In passing, it is relevant to note that Counsel for the first, second and the fourth defendants had submitted that two of the properties charged had been redeemed and as such the Court could not grant an order for sale on the application. However, I had to disregard this objection as there was nothing stated in the affidavit.

The first, second and fourth defendants and the intervener had subsequently filed separate summons-in-chambers for an order that the execution of the judgment against them be stayed pending the disposal of the appeal and after hearing arguments, I was of the view that this was a case where the appellants would be irremediably injured if there was no stay should their appeals succeed. In that event, their appeals would be rendered nugatory. This is of course a matter of discretion and although I had been guided by previous authorities which state that this does not amount to special circumstances, I am of the view that the plaintiff would not be prejudiced by the delayed execution in the circumstances in the interest of the first, second and fourth defendants and the intervener.

Counsel for the plaintiff had also applied for a postponement as regards the fact that two of the properties had been redeemed after the application which fact I had disregarded earlier when informed by Counsel for the first, second and fourth defendants and the intervener but since the plaintiff had made a formal application to amend the order for sale, which is now pending, my view was that the orders for stay would also enable them to sort out the situation as regards the other properties charged.

Also found at [1989] 2 CLJ 1200